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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CAROLE MIGDEN, et al., Plaintiffs, vs. CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, et al., Defendants.	No.: 2:08-CV-00486-EFB **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Hearing: Date: April 1, 2008 Time: 10:00 a.m. Crtrm: 25 (The Honorable Edmund F. Brennan)

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INTRODUCTION

Unable to meet the force and logic of Senator Migden's arguments, the FPPC responds with a series of deflections. First, it strains to cast and recast this case as involving restrictions on the personal use of campaign funds. This case involves no such allegation, or even a suggestion that Senator Migden intends or has in fact used the subject funds for personal use. Instead, Senator Migden seeks to use her lawfully collected campaign funds for lawful campaign expenditures in her current reelection campaign. That is why Government Code section 89519 acts here as an expenditure limitation – because the statute's application in these circumstances limits Senator Migden's ability to spend her campaign funds on campaign-related expenditures. And it is in that context that the California Attorney General concluded long ago that section 89519 was unconstitutional.

Next, insisting that section 89519 has a single purpose – to prevent candidates from misusing campaign funds for personal uses once they have left office – the FPPC analyzes section 89519 as it would a related statute that prohibits the use of campaign funds to purchase a car and argues that strict scrutiny does not apply because "[a] purchase of this nature is not an expenditure on political speech."[1] Conversely, the FPPC posits that "[t]he interest served by California's surplus funds statute is . . . to ensure that campaign funds are actually put to use in campaigns. . . ." Opp. at 21-22. However, the FPPC has not and cannot explain how that purpose is served by barring Senator Migden from putting her campaign funds "to use in [her] campaigns." If preventing the personal use of campaign funds by retired legislators is indeed the sole purpose of section 89519, then that purpose has no application here. In this case, the FPPC would use the statute to restrict the amount of money that Senator Migden can spend on political speech during her reelection campaign. Thus, the FPPC's enforcement of section 89519 in this context directly and substantially infringes Senator Migden's First Amendment rights, and cannot survive strict scrutiny.

Finally, in perhaps the most egregious deflection, the FPPC claims that this lawsuit was filed to derail its investigation of company reporting errors. Nothing could be further from the truth. As the FPPC knows full well, its investigation arose from Senator Migden's self-reporting (not from

[1] Defs.' Opp. to Pls.' Mot. for Prelim. Inj. ("Opp.") at 10.

any third party complaint) and Senator Migden commenced this action only after reaching agreement with FPPC staff to resolve this important issue of constitutional law in this manner.

Senator Migden cannot wait any longer to spend these funds or she risks losing her campaign for re-election. Indeed, her most vocal opponent already is on the air, broadcasting his first television ad and generating much press in the process. Each day that ad goes unanswered irreparably harms Senator Migden's efforts to secure her party's nomination in June. Preliminary relief is called for here.

ARGUMENT

I.

THE FPPC UTTERLY FAILS TO REFUTE PLAINTIFFS' SHOWING THAT THEY ARE LIKELY TO WIN ON THE MERITS AND ARE SUFFERING IRREPARABLE HARM

The Ninth Circuit and this Court have held unconstitutional attempts to stop candidates from transferring funds between their committees. The California Attorney General has concluded that the surplus funds statute at issue here is just such an unconstitutional transfer ban. The FPPC cannot dispute that transfer bans are unconstitutional, so instead it argues that the statute is actually only a ban on the personal use of campaign funds. That is not how it is being used here, however. It is being used to bar Senator Migden's expenditure of campaign funds on political speech. This is an expenditure limit that cannot survive strict scrutiny.

A. The FPPC Fails to Refute Plaintiffs' Showing That Section 89519 Operates As a Transfer Ban and Thus Is an Expenditure Limit Subject to Strict Scrutiny

The FPPC's argument that strict scrutiny does not apply here is premised on its belief that not all expenditures made from candidate funds are equal under the Constitution. In particular, the FPPC suggests that campaign funds spent on personal use and campaign funds spent after a candidate leaves the office for which those funds were raised are subject to a lower level of scrutiny.

At bottom, however, the FPPC's focus on personal use laws is a red herring. Restrictions on the use of campaign funds for personal purchases do not implicate a candidate's First Amendment rights because, as defendant FPPC points out, an expenditure for such personal uses "is not an expenditure on political speech." Opp. at 10. Thus, the existence of such statutes, and the lack of cases challenging them, simply have no bearing on the constitutionality of a restriction on the use of

campaign funds for campaign purposes.[2] No constitutional question would be raised if this were a situation where the surplus funds statute was being applied to prohibit a retired officeholder from using left-over campaign funds for personal expenses – which, according to the FPPC, is what the statute is "narrowly tailored" to do. *Id.* at 18.

Whether a statute that bars the personal use of campaign funds is subject to lesser scrutiny thus is wholly irrelevant to this litigation. The only question before this Court is whether a statute may bar the expenditure of left-over campaign funds on political speech in a later campaign. As to that, the answer is clear and unequivocal: limits on a candidate's ability to spend campaign funds on political speech operate as a direct restraint on the candidate's First Amendment rights and to date, the U.S. Supreme Court has found no governmental interest sufficient to justify such a restraint. *Randall v. Sorrell*, 548 U.S. 230, 126 S. Ct. 2479, 2488-89 (2006).

That is true regardless of when the campaign funds were raised, or for what purpose they initially were raised. This Court and the Ninth Circuit soundly rejected claims to the contrary in the Proposition 73 litigation discussed in plaintiffs' opening brief. As Judge Karlton said in an early stage of that litigation,

> It is the essence of *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] that each dollar has First Amendment value.
>
> *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 721 F. Supp. 1172, 1176 (E.D. Cal. 1989).

After granting a preliminary injunction to plaintiffs, Judge Karlton held on summary judgment that the prohibition on candidates carrying over funds raised prior to the onset of Proposition 73's contribution limits was unconstitutional. *Id*. at 1180. He subsequently struck down the ban on transferring funds

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[2] The FPPC makes much ado about the fact that plaintiffs cited no case in which a personal use prohibition has been struck down by a court. Indeed, we did not, and we doubt there is such a case. Prohibiting use of campaign funds for personal purposes does not infringe upon a candidate's First Amendment right of speech, which arises when campaign funds are spent on political speech and related expenses, not when such funds are spent on cars. We are unaware of any constitutional right that protects a candidate's expenditure of campaign funds on a personal car. By contrast, the First Amendment clearly protects a candidate's expenditure of campaign funds on such things as broadcast ads and campaign mailings, and plaintiffs cite many cases protecting a candidate's right to make such expenditures from his or her campaign funds, regardless of when those funds were raised.

from one candidate committee to another committee of that same candidate. *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 747 F. Supp. 580, 591 (E.D. 1990). His logic bears repeating here:

> On May 19, 1989, this court issued a preliminary injunction, finding the ban on transfers among a candidate's own committee burdens First Amendment rights and serves no compelling state interest sufficient to justify those burdens. The court believes that the injunction should be made permanent. It is clear that the ban acts as an expenditure limitation; such limitations have never been upheld, save in connection with the expenditures of corporations. Moreover, the sole justification offered for the inter-committee transfer ban, is a notion that contributions given for one office ought not be diverted to another, because the donation was solicited and given with a particular office in mind. This "trust" theory, which suggests donations are premised upon the office rather than the candidate, may, of course, sometimes be true; on the other hand, as evidence in this trial demonstrated, it is sometimes false. [Fn. omitted.] More to the point, it is clear that to the extent the provision is intended to insure truth in soliciting, a narrower and more efficacious means is readily at hand. Such a purpose is easily served by requiring that the candidate inform potential donors of his intentions, or if he is unable to do so, to acknowledge that the sums raised could be expended on other races. For these reasons, and essentially for the reasons argued by plaintiffs in their points and authorities in support of preliminary injunctive relief, the court enjoins the enforcement of those provisions of Proposition 73 prohibiting transfers between the various committees of the same candidate.
>
> *Id.*

Both rulings were upheld by the Ninth Circuit, which agreed that the ban on transfers between a candidate's own committees

> operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent. [Fn. omitted.] Expenditure limitations are subject to strict scrutiny and will be upheld only if they are "narrowly tailored to serve a compelling state interest."
>
> *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1322 (9th Cir. 1992), *cert denied*, 505 U.S. 1230 (1992) (citation omitted).

The surplus funds statute at issue here is no different in operation from the transfer and carry-over bans struck down in the Proposition 73 litigation. All three operate to restrain a candidate's right to spend campaign funds on political speech. A direct impairment of a candidate's free speech rights is subject to strict scrutiny review. It is no surprise then that every case of which we are aware that involved a restriction on transfers of campaign funds between a candidate's own committees has

treated such restrictions as an expenditure limit subject to strict scrutiny. *Id.*; *Shrink Missouri Gov't PAC v. Maupin*, 71 F.3d 1422, 1428 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996) ("spend down" provision that prevents candidates from spending excess campaign funds in a future election "limits the quantity of a candidate's speech in future elections. We note that this effect is identical to the effect of the expenditure limits addressed earlier in this opinion except that the impact of the provision is postponed to future elections. . . . [T]he provision must be subjected to strict scrutiny."); *Suster v. Marshall*, 149 F.3d 523, 534 (6th Cir. 1998); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 631 (Alaska 1999) (agreeing that restrictions on use of carry-over campaign funds "directly limited expenditures and therefore burdened speech" and could be upheld only if "the State has compelling interests justifying this burden").[3]

The strict scrutiny test requires that the FPPC show that section 89519 is narrowly tailored to meet a compelling state interest. *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976). As demonstrated below, the state interest advanced by the FPPC in support of section 89519 is in no way met by its application here.

B. The FPPC's Sole Rationale for the Transfer Ban, to Prevent Personal Use of Campaign Funds, Is Irrelevant as a Matter of Law and Fact

The FPPC contends "there is an unassailable state interest" in Government Code section 89519, which is "the need to guard against the enhanced potential for a *former* candidate to use campaign funds for personal enrichment . . . ." Opp. at 2 (emphasis in original).[4] No one argues here that campaign funds should be available for personal use by a current or former candidate. That

[3] The FPPC focuses on *State v. Alaska Civil Liberties Union*, which upheld an intra-candidate transfer ban on the ground that it served a compelling state interest in preventing circumvention of the state's contribution limits. 978 P.2d at 632. As the FPPC admits, however, no such similar interest is advanced in support of the surplus funds statute because "California prevents circumvention of contribution limits by an alternative means," namely rules requiring attribution of transferred funds to particular contributors. Opp. at 13, n.10. In addition, Government Code section 85306 expressly permits a candidate who has pre-Proposition 34 funds to transfer those funds to a committee for a future election without limit. Thus, section 89519 cannot be justified as an anti-circumvention measure because the State has always permitted the full use of the contributions Senator Migden wishes to use here. *See* Pls.' Mot. for Prelim. Inj. ("Pls.' Mot.") at 15-16, and 20.

[4] Interestingly, that interest is nowhere mentioned in the FPPC's opinion allowing Senator Corbett to use her surplus campaign funds on a new election. *In re Pirayou*, 19 FPPC Opn. 1 (2006) (attached as Ex. B to Harrison Decl.).

simply is not an issue in this litigation. Senator Migden, who is a current officeholder and candidate, and her campaign consultant have offered declarations attesting to their intent to use the funds at issue on campaign-related expenditures such as television, radio and direct mail. Migden Decl., ¶ 7; Ross Decl., ¶¶ 5-6.

In any event, other provisions of the Political Reform Act already serve that interest by prohibiting the personal use of campaign funds held by a candidate committee: Government Code sections 89512 and 89512.5 require that the expenditure of campaign funds be related to a political, legislative or governmental purpose. Sections 89513 through 89518 provide detailed laundry lists of acceptable and unacceptable uses of campaign funds. For example, campaign funds may be used to buy a tuxedo (*id.*, § 89513(d)) but not to purchase real property (*id.*, § 89517(b)). Those statutes adequately and thoroughly take care of the government's interest in ensuring that campaign funds – whether surplus or not – are not used for personal purposes, and these statutes apply to all campaign funds, regardless of whether a person is a candidate, officeholder or former officerholder.

The legislative history of the surplus funds statute is informative not because it proffers a compelling governmental interest in preventing Senator Migden's expenditure of her campaign funds, but because it demonstrates that the original drafters were highly cognizant of the need to protect a candidate's ability to make unfettered use of campaign funds for campaign purposes. Thus, the findings and declarations of the original surplus funds statute included a finding that "any restrictions on the use of political funds must be carefully drawn and narrowly construed to prevent any chilling effect on the political process and the freedom of elected officials to carry out legitimate governmental duties." Rowan Decl., Ex. C at 1 (Former Elec. Code § 12400). Accordingly, as initially drafted – and the FPPC insists the language of that initial statute is "in all respects pertinent to this constitutional claim, identical to the statute now before this Court" (Opp. at 3) – the surplus funds statute explicitly allowed such funds to be

> Held in a segregated fund for future political campaigns not to be expended except for political activity reasonably related to preparing for future candidacy to elective office.
>
> Rowan Decl., Ex. C (Former Elec. Code § 12404(f)).

This, of course, is exactly what Senator Migden's treasurer did with her left-over campaign funds:

> At the time I opened the [certificate of deposit], Senator Migden was still in office and her pre-Proposition 34 funds were not surplus. There was no question in my mind that by physically transferring those pre-Proposition 34 funds out of the Assembly committee checking account and into a separate segregated fund set up for future elections, those funds would not become surplus. . . . I do not believe Senator Migden's pre-Proposition 34 funds ever became surplus because they were removed from her Assembly Committee before they became surplus, and they are now part of her 2004 Committee funds, an office which she continues to hold.
>
> Sanders Decl., ¶ 7.

If the *Sacramento Bee* editorial unearthed by the FPPC can be seen as an accurate reflection of what the drafters intended, then Senator Migden's actions would be fully consistent with that intent.

> Previously, office seekers with campaign surpluses would find uses for the funds for things other than financing the next election. Some purchased nifty sports cars or redecorated that drab apartment.. . . . ¶ The measure, SB 42 by Sen. Paul Carpenter, D-Cypress, imposes civil penalties for the misuse of campaign money and prohibits retiring lawmakers from taking the surpluses with them. Politicians with left-over money will be allowed to contribute it to another campaign, donate it to charity, return the money to contributors, or hold on to it for their own future campaigns. Politics should be a little cleaner because of this new law.
>
> Rowan Decl., Ex. D.

Thus, if the surplus funds statute is, as the FPPC insists, simply another means of ensuring that campaign funds are not spent for personal uses, that interest is met by allowing expenditure of the funds for campaign purposes.

While the FPPC mentions in passing other interests served by the surplus funds statute, none rise to the level of a compelling state interest.[5] The FPPC's assertion that the surplus funds

[5] The FPPC tries to distract the Court's attention by discussing public officials who have used campaign funds for personal use, including a long-gone California Senator who sought to dispose of campaign funds through a testamentary bequest (Opp. at 3-4) and officials from other states who were convicted of using campaign funds to pay a personal mortgage or for other personal benefit (Opp. at 4, n.3). Similarly, the FPPC points to state officials who have "recently generated extensive press accounts of lavish 'lifestyle' spending for very questionable purposes," leading the FPPC to propose additional disclosure regulations for campaign funds spent on travel and meals. Opp. at 17; Hallabrin (continued . . .)

statute "ensure[s] the integrity of personal use restrictions after a candidate leaves office," suggests it sees the statute as necessary to prevent circumvention of the other personal use prohibitions in the Political Reform Act by candidates no longer in office and no longer under public scrutiny. Opp. at 9; Wardlow Decl., ¶ 11. While the prevention of circumvention can in some instances be a legitimate state interest,[6] it is hard to see how the surplus funds statute adds anything here. If a candidate is going to violate the personal use laws once he or she is out of office, then the existence of one more personal use law hardly seems a deterrent. If the FPPC cannot be bothered to review campaign reports filed by former candidates,[7] then the state cannot be said to have a compelling interest in having yet another law whose violations go undetected. In any event, this interest is not served by the application of the statute to a current candidate and officeholder who desires to use the funds on legitimate campaign expenses. *See Wisconsin Right to Life, Inc.*, 127 S. Ct. at 2671 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech.") (emphasis in original).

Even if it were a better fit, the interest in preventing circumvention of the personal use laws cannot justify a restriction on candidates' legitimate campaign expenditures. Nor is it enough simply to assert that the state has a legitimate interest in setting a deadline for the transfer of campaign funds because "nearly *every* 'surplus funds' statute in the country establishes a date at which the funds become 'surplus.'" Opp. at 14, emphasis in original. As the United States Supreme Court stated in its most recent campaign finance decision,

> [S]uch a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. "[T]he desire for a bright-line rule . . . hardly constitutes the *compelling* state interest

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(. . . continued)
Decl., ¶ 4; Exs. A, B, & C. What the FPPC does not point out is any possible relevance between those concerns and the question at issue here: whether arbitrary restrictions on the use of lawfully-raised campaign funds for campaign expenditures infringe on a candidate's First Amendment right to make campaign expenditures.

[6] *But see Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, __ U.S. __, 127 S. Ct. 2652, 2672 (2007) (rejecting as inconsistent with strict scrutiny the use of circumvention as a justification for a campaign finance regulation that infringes on lawful speech).

[7] Wardlow Decl., ¶ 11.

> necessary to justify any infringement on First Amendment freedom." [*FEC v. Mass. Citizens for Life, Inc.*], 479 U.S. [238] at 263, 107 S. Ct. 616 [(1986)]. *See* [*Ashcroft v.*] *Free Speech Coalition*, 535 U.S. [234] 255, 122 S. Ct. 1389 [(2002)] ("The Government may not suppress lawful speech as the means to suppress unlawful speech"); *Buckley*, *supra*, at 44, 96 S. Ct. 612 (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations").
>
> *Wisconsin Right to Life, Inc.*, 127 S. Ct. at 2672 (emphasis in original).

The FPPC suggests the surplus funds statute serves a related state interest in ensuring that candidates do not retain surplus funds indefinitely after leaving office. Opp. at 14. Here again, however, the only problem the FPPC points to in holding surplus funds indefinitely is what it believes to be an increased potential for violation of the personal use laws. *Id.* at 14. If the state has a compelling interest in requiring candidates to close out old campaign accounts, that interest arose only recently: until the enactment of regulations in 2001, the State of California allowed campaign committees to stay open indefinitely. Cal. Code Regs., tit. 2, § 18404.1. Indeed, while federal candidates are prohibited from using campaign funds for personal uses (just like California candidates), they face no time restriction on when they must close out their old campaign committees.[8] In any event, if such an interest exists, it is better met by a less restrictive means, namely the FPPC rules for committee termination, which allow leeway to keep committees open "for good cause." *See* Pls.' Mot. at 18-19; *cf. Shrink Missouri Gov't PAC*, 71 F.3d at 1428-29 (holding that spend-down provision requiring candidates to spend or return contributions within ninety days of an election is not narrowly tailored to meet the interests it allegedly serves).

Undeterred by the Ninth Circuit's decision, the FPPC again raises the trust theory rejected in the Proposition 73 litigation, this time providing background on the "one-bank account" rule to justify the requirement that Senator Migden's left-over campaign funds had to be transferred in a particular order to her current Senate reelection campaign committee before they could be spent on the reelection campaign. Opp. at 7-8. That argument proves nothing, however. Senator Migden is

[8] Federal Election Commission regulations address the circumstances under which a former federal candidate's campaign committee "may" be terminated, but do not require termination. 11 C.F.R. §§ 102.3 and 102.4.

suing for the *right* to transfer her left-over funds to her Senate reelection campaign committee now, when she needs them – a right which is being denied her only because the transfer is taking place after the statute's deadline. Senator Migden is not attacking the transfer requirement per se, or the one-bank account rule. Instead, she is challenging the enforcement of the *timing* aspect of the transfer requirement where its effect is to prevent Senator Migden from spending left-over campaign funds on her current reelection campaign.

The FPPC suggests that Senator Migden's left-over campaign funds can be regulated because they were raised for a different office and, as to that office, Senator Migden is a "former" candidate. Opp. at 16-17. This hair-splitting only highlights the arbitrary nature of the deadline imposed by section 89519. In the FPPC's view, if Senator Migden had transferred the funds before the statutory deadline to a committee established for the 2018 gubernatorial election, she could use them without restriction when the time came for that campaign, even if during the interim she held no public office and no one was scrutinizing her campaign records.

The FPPC may very well be correct that "[a] statute that limits the [personal] use of campaign funds by former officeholders . . . is 'narrowly tailored' to a compelling state interest in deterring conversion of these funds by retired officeholders to their personal use." Opp. at 18. That is not how the statute is being applied here, however. It is being applied to prevent a current officeholder from using her campaign funds on political speech necessary for her current reelection campaign. As to that use, the FPPC proffers no justification, never mind one that survives strict scrutiny.

C. <u>The FPPC Has Not Rebutted Senator Migden's Showing of Irreparable Harm</u>

There can be no dispute that Senator Migden is suffering irreparable harm, and immediate relief is required. The election is only a few months away, and at least one of her opponents is already up on the air with an advertisement. Second Decl. of James C. Harrison in Supp. Mot. for Prelim. Inj. ("Second Harrison Decl."), ¶ 4, Exs. A & B. Absent immediate relief, Senator Migden will be unable to effectively communicate with voters. In the opening brief, Senator Migden established that she needed access to her campaign funds by the beginning of April in order to mount a successful campaign. Pls.' Mot. at 8; Migden Decl., ¶ 7; Ross Decl., ¶ 6. The FPPC has ignored this evidence and provided nothing to rebut it.

As discussed in the opening brief, the Supreme Court has made it clear that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of the issuance of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002).

In fact, the Ninth Circuit has held that once a plaintiff shows he or she is likely to prevail on a First Amendment claim, the need for an injunction is met without any additional showing. *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment claim had thereby also demonstrated irreparable harm). Thus, if the Court concludes plaintiffs are likely to prevail as a matter of law, the court should enter the injunction.

The Ninth Circuit has also made clear that plaintiffs need not even "clearly establish" that their First Amendment rights have been violated for an injunction to issue.

> "Under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim."
>
> *Sammartano*, 303 F.3d at 974 (citations omitted).

The FPPC ignores both the facts and law establishing irreparable injury. Instead, it argues that the Court should refuse to grant plaintiffs' motion and instead grant relief "by an expedited motion for summary judgment on the FPPC's Counterclaim."[9] Opp. at 22. This argument, and indeed the FPPC's entire brief, ignores the urgency of Senator Migden's request: she faces a hotly contested primary on June 5, 2008, and needs to spend her campaign funds to reach voters – including absentee voters – as soon as possible. Pls.' Mot. at 2, 8; Migden Decl., ¶ 7; Ross Decl. ¶ 6. She cannot wait for summary judgment on a Counterclaim that will not even be filed – if it is filed – until March 25. Relief, to be effective, must be granted soon to have any effect on her campaign. Furthermore, to the extent that defendants' proposed counterclaim relates to Senator Migden's use of her pre-

[9] The FPPC has indicated that a counterclaim will seek damages against Senator Migden for having already spent some of the funds the FPPC believes are "surplus." Opp. at 22.

Proposition 34 funds before the FPPC notified her that she could not spend them, those claims, by definition, must await the resolution of plaintiffs' constitutional claims. If plaintiffs had the right to use these funds, then defendants will have no basis for penalizing plaintiffs for such use.

When the FPPC decided to waive section 89519 for Senator Corbett in 2006 so she could spend surplus funds for a new campaign, which is exactly what Senator Migden wishes to do here, one of the "extraordinary and relevant" facts the FPPC relied on to let her use those funds was that she was "running in a highly contested election in June 2006 and denial of her request will result in severe harm to her candidacy." *In re Pirayou*, 19 FPPC Ops. 1, 7. Given this admission, it is absurd for the FPPC to come before this Court and claim Senator Migden is not being harmed by its decision to selectively enforce section 89519 against her.

II.

SERIOUS QUESTIONS ARE RAISED AND THE BALANCE OF HARDSHIPS TIPS SHARPLY IN FAVOR OF PLAINTIFFS

As discussed in plaintiffs' opening brief, the alternative test for issuance of an injunction is that plaintiffs show that "serious questions are raised and the balance of hardships tips in [their] favor." *Sammartano*, 303 F.3d at 965. That test is surely met here, and the FPPC has done nothing to rebut that showing.

The first prong of the test cannot be in controversy. Even though the FPPC tries to argue that plaintiffs cannot prevail as a matter of law, it cannot seriously contend that the case fails to raise serious questions. "Because the test for granting a preliminary injunction is 'a continuum in which the required showing of harm varies inversely with the required showing of meritoriousness,' when the harm claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness." *Id.* at 973-74 (citations omitted).

The state of the relevant law is this: (1) controlling case law from the Ninth Circuit and this Court holds that intra-candidate transfers like the one Senator Migden proposes here are constitutionally permissible and cannot be prohibited; (2) in 1995, the California Attorney General held that the exact provision at issue here – section 89519 – was unconstitutional to the extent it prohibited candidates from transferring funds to a committee established for a future election; (3) the

FPPC has not cited one case that supports its view that intra-candidate transfers like the one here are not subject to strict scrutiny; (4) the FPPC's entire defense of the transfer ban, that it is needed to keep former officeholders from using surplus campaign funds for personal use, is irrelevant because Senator Migden will use the funds for her reelection campaign, not for personal use, and other existing laws prohibit former officeholders from using campaign funds for personal use; and (5) the arbitrary transfer deadline the FPPC seeks to enforce here does nothing to further its concern over the use of campaign funds for personal use. To say this case raises serious questions is an understatement.

The second prong of the test is also easily met: the balance of hardships tips sharply in favor of plaintiffs. As discussed above, plaintiffs are irreparably harmed by the FPPC's selective enforcement of section 89519, for it severely restricts Senator Migden's ability to communicate with voters in the midst of a highly competitive election campaign. *See*, *e.g.*, *Shrink Missouri Government PAC v. Adams,* 151 F.3d 763, 764 (8th Cir. 1998), *cert. granted on other grounds*, *Nixon v. Shrink Missouri Gov't PAC*, 525 U.S. 1121 (1999). The FPPC offers no authority for the proposition that restrictions on campaign speech do not cause irreparable harm.

Nonetheless, the FPPC argues that the balance of hardships tips in its favor because a government always has an interest in effectuating its own laws.[10] Opp. at 23. The FPPC, however, offers no authority holding that a government's undifferentiated and intangible interest in enforcing laws outweighs concrete deprivations of First Amendment rights. Nor could it – the First Amendment only comes into play when the government enacts a statute that infringes on a citizen's speech rights. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

In addition, if an injunction is entered but later reversed, the only result will have been that Senator Migden will have spent more money on political speech. But the Supreme Court has held that an interest in curbing the amount of money spent on elections is not sufficient to warrant

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[10] The FPPC relies exclusively on *Coalition for Economic Equity v. Wilson*, 122 F.3d 718 (9th Cir. 1997), for this point. But as is clear from that case, a government only has a legitimate interest in effectuating *constitutional* laws, not all laws. In *Wilson*, the Ninth Circuit had already ruled the law at issue was constitutional and had refused to hear the case en banc. Therefore, the Court saw no need to stay the mandate while the parties sought review by the Supreme Court. *Id.* at 719. Here, the court is determining whether the law is constitutional, and therefore *Wilson* is inapposite.

governmental restrictions and as a matter of constitutional law, candidate spending cannot be curtailed. *Buckley*, 424 U.S. at 57-58. Thus, it can hardly be said that permitting Senator Migden to use her lawfully raised contributions for political speech would harm the FPPC.

The FPPC claims that Senator Migden initiated this action to preempt an enforcement action involving "more than a hundred alleged violations of California law" by Senator Migden and her committees, thereby interfering with its investigation. Although Senator Migden's motive for filing this lawsuit is irrelevant to the legal question before the Court, it is important to set the record straight. Prior to filing this suit, Senator Migden and the FPPC expressly agreed to bifurcate the issues presented by this lawsuit from the campaign reporting problems cited by the FPPC in its opposition brief. Second Harrison Decl., ¶ 3. Because this case presents an issue of law, the parties agreed it would be appropriate to litigate while simultaneously settling the campaign reporting errors. *Id.*, ¶ 3. On March 17, before the FPPC filed its brief, the parties entered into a stipulation encompassing eighty-nine campaign reporting errors.[11] *Id.*, ¶ 3. It is disingenuous at best, therefore, for the FPPC to suggest that this action is an attempt to preempt the FPPC's enforcement action.[12]

The FPPC also spends considerable effort arguing that Senator Migden should have done something to sort this out earlier. Opp. at 23-25. But the argument is both factually wrong and legally irrelevant to the question of which party will suffer more harm by the issuance of an injunction.

It is factually wrong because Senator Migden did not sit on her rights; once she discovered that the FPPC was taking the position that some of her campaign funds were surplus, she immediately petitioned the FPPC, without success, to change its position. Second Harrison Decl., ¶ 3.

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[11] Plaintiffs strenuously object to defendants' oblique references to these alleged violations as irrelevant and prejudicial facts not before this court. However, to set the record straight, plaintiffs have set forth the facts that led to this action in the Second Harrison and Migden declarations.

[12] The FPPC devotes considerable attention to its allegations regarding Senator Migden's prior use and reporting of funds in an Assembly checking account that is not at issue here. Opp. at 18-21. These allegations are simply not relevant to plaintiffs' claim that the application of section 89519 to prevent Senator Migden from spending lawfully-raised campaign funds is unconstitutional. It is important to note, however, that plaintiffs treated the funds in the Sterling Bank account as belonging to the 2004 committee because they believed that by setting the funds aside in a segregated account they had accomplished a transfer. Sanders Decl., ¶ 7; Migden Decl., ¶ 3. Whether plaintiffs were correct is irrelevant for present purposes because this case assumes the funds were not transferred before the deadline set by section 89519.

The FPPC informed Senator Migden of its final position on February 15, 2008, and Senator Migden promptly brought this lawsuit.

Ignoring this history, the FPPC suggests that Senator Migden should have formally requested that the FPPC waive the transfer deadline like Senator Corbett did through the *Pirayou* Opinion. Opp. at 24. The argument is disingenuous at best. First, Senator Migden did ask the FPPC, as part of settlement discussions, for such a waiver as soon as the FPPC informed her of its position. Harrison Decl., ¶ 3. Second, as it well knows, the FPPC would have refused a formal request for advice from Senator Migden because it only entertains requests about future, not past, conduct (Cal. Code Regs., tit. 2, § 18329(b)(8)(A)), and Senator Migden had already transferred her funds not knowing they were considered surplus. In sum, the FPPC would have refused any request for advice because it believed Senator Migden had already violated the law.

In fact, the *Pirayou* Opinion is devastating to the FPPC's position both in this case in general and to the balance of hardships question in particular.[13] The *Pirayou* Opinion shows two things. First, the intra-candidate transfer ban in section 89519 is so unimportant that the FPPC only selectively enforces it. Against Senator Corbett, it is not enforced; against Senator Migden, it is. That is true even though the essential facts of the two cases are the same: an inadvertent error by their treasurers resulted in the transfer deadline being missed and both candidates wanted to use those funds for a new election campaign. Having decided not to enforce the rule once, the FPPC cannot now stand before this Court and seriously argue that it or the general public will be gravely harmed if the rule is not enforced one more time.

Second, it is in the *Pirayou* Opinion, not here in after-the-fact litigation, that the FPPC states the real purpose of the surplus funds provisions: "we find that the candidate's request is not inconsistent with the overall purposes of the surplus funds statute *to prevent candidates from using old funds to finance future campaigns*." *In re Pirayou*, 19 FPPC Op. 1, 7 (emphasis added). In the *Pirayou* Opinion, there is not a word about the transfer deadline being needed to prevent former officeholders from using campaign funds for personal use. That makes sense since the transfer

[13] Harrison Decl., Ex. B.

deadline has nothing to do with whether a former officeholder can use those funds for personal use. Other laws ensure that is so. Rather, the FPPC admits to the real purpose of the provision: to prevent old campaign funds from being used for future campaigns. That of course is precisely what the Ninth Circuit and this Court said is unconstitutional. *SEIU*, 955 F.2d at 1322; *SEIU*, 721 F. Supp. at 1180.

Finally, the Court must examine the public interest in determining the appropriateness of the preliminary injunction. *See Sammartano*, 303 F.3d at 965; *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992). The potential for impact on nonparties, the voters, is plainly present here. "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Sammaranto,* 303 F.3d at 974. That is especially true in the context of political speech cases, like this one. By restricting Senator Migden's ability to communicate with voters as the election nears, the FPPC seeks to limit public discussion about issues and candidates. Courts have squarely held that is against the public interest. "[W]e believe the public interest in free political speech weighs heavily in favor of enjoining the challenged contribution limits pending this Court's final determination on the merits." *Shrink Missouri Gov't PAC v. Adams*, 151 F.3d at 765; *see also Sammaranto*, 303 F.3d at 974 (public interest favors preliminary injunction protecting First Amendment rights); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001) ("[W]e believe that the public interest is better served by following binding Supreme Court precedent and protecting the core First Amendment right of political expression."); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("the potential harm to independent expression and certainty in public discussion of issues is great and the public interest favors protecting core First Amendment freedoms").

Permitting Senator Migden to use lawfully raised contributions for her reelection means that more voters will hear more political dialogue and will be better equipped to decide on Election Day. Far from being a burden on the public interest, an injunction is just what the First Amendment invites and requires.

CONCLUSION

This case presents a simple question: may the State prohibit a candidate from using lawfully-raised campaign funds in her reelection campaign. The answer is so clearly no that nothing remains for the FPPC to dispute other than irrelevant and inflammatory facts. The preliminary injunction should issue forthwith.

Dated: March 21, 2008

Respectfully submitted,

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